

Hexacomb Corporation and Western Temporary Services, Inc., Joint Employers and United Paperworkers International Union, AFL-CIO, CLC, Petitioner. Case 7-RC-20044

March 3, 1994

DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

Upon a petition for election filed under Section 9(c) of the National Labor Relations Act, a hearing was held on May 19 and 20, 1993, before a duly designated hearing officer of the National Labor Relations Board. On July 22, 1993, pursuant to Section 102.67(h) of the Board's Rules and Regulations, the case was transferred to the Board for decision.

Having carefully reviewed the entire record in this proceeding, including the posthearing briefs filed by the parties, the Board makes the following findings:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employers are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employers.
4. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Hexacomb Corporation (Hexacomb) is a corporation with a manufacturing facility located in Kalamazoo, Michigan, and is engaged in the manufacture and non-retail sale of paper packaging material. Western Temporary Services, Inc. (Western) is a California corporation with an office located in Kalamazoo where it is engaged in the operation of a contract temporary employment agency. At the time of the hearing, Hexacomb employed 98 employees, excluding supervisors and including approximately 23 employees supplied by Western. The Petitioner seeks to represent all full-time and regular part-time production and maintenance employees employed at Hexacomb's Kalamazoo, Michigan facility, including those employees supplied by Western, and excluding office clerical employees, guards, professional employees, and supervisors as defined by the Act.¹

This case presents two issues: (1) Whether a combined unit of employees employed solely by

Hexacomb and employees supplied by Western to Hexacomb is an appropriate unit for bargaining under the Act and (2) whether three EDF foremen/assistant supervisors and one foreman, Gerardo L. (Mick) Gonzalez, are statutory supervisors.

1. The Petitioner contends that a combined unit of Hexacomb employees and employees supplied by Western is appropriate based on its assertion that Hexacomb and Western are joint employers. Hexacomb argues that the unit is inappropriate because the 2 employers are not joint employers, and that the 23 employees supplied by Western are solely employed by Western.² Moreover, it asserts that the two groups of employees do not share a sufficient community of interest to be included in one unit.

It is well established that the Board does not include employees of joint employers in a unit with employees of a single employer, absent employer consent. *Lee Hospital*, 300 NLRB 947 (1990); and *Greenhoot, Inc.*, 205 NLRB 250 (1973). It is clear from the record that neither Hexacomb nor Western has expressed its consent to multiemployer bargaining in the unit sought. Thus, even if, as contended by the Petitioner, Hexacomb and Western are found to be joint employers, the Board would not find appropriate the petitioned-for combined unit. Accordingly, we find it unnecessary to resolve the issue of whether Hexacomb and Western are joint employers because, even if such a relationship were found, we would not find the petitioned-for unit appropriate. See also *Hughes Aircraft Co.*, 308 NLRB 82 (1992); and *International Transfer of Florida*, 305 NLRB 150 (1991).³

2. The Petitioner also contends that Hexacomb's EDF foremen/assistant supervisors and foreman Gonzalez are statutory supervisors. Hexacomb takes no position on the issue of these employees' supervisory status.

There are three EDF foremen/assistant supervisors, all of whom the Petitioner contends are statutory supervisors. Each of these individuals is the foreman over an EDF panel line. They are experienced EDF operators whose primary responsibilities include monitoring production and training employees regarding the use of work procedures. They do not work the line as a rule unless there is a problem. EDF foremen/assistant supervisors are supervised by conceded supervisors. As part of their duties, the EDF foremen/assistant supervisors substitute for their respective supervisors when the supervisors are sick, or

²No party asserts that these employees are solely employed by Hexacomb.

³Member Truesdale joins his colleagues in applying the *Greenhoot* doctrine here. However, he agrees with the Chairman's observation in *Brookdale Hospital Medical Center*, 313 NLRB 63 74 fn. 4 (1993), that in view of the recent trend toward increased reliance on contract labor, "it may be appropriate for the Board at some future point to reexamine the continued validity of *Greenhoot*."

¹At the hearing, the Petitioner declined to accept a motion by Hexacomb to modify the instant petition to state that the Petitioner wished to represent only "plant production and maintenance employees." However, it is clear from the record that office clericals and all other office employees were intended to be excluded from the petitioned-for unit.

on vacation or other leave. This situation occurs approximately 8–10 percent of the time.

Each of the three EDF foremen/assistant supervisors has approximately 12 employees under him. The three individuals have no hire, fire, recall, or promotion authority. They can recommend overtime and sign time-cards verifying time worked for employees to receive overtime pay. These individuals have the authority to shift employees around within their respective lines to get projects done. They also have the authority to call breaks and shut down machinery in their respective areas. The EDF foremen/assistant supervisors are hourly paid and basically have the same wages and fringe benefits as conceded nonsupervisory employees. These individuals punch in and out like the conceded nonsupervisory employees but, unlike them, do not do so on breaks. EDF foremen/assistant supervisors do not independently evaluate employees but rather provide information to conceded supervisors for their use in employee evaluations. They have access to keys and codes, including access to supply cabinets, but do not have access to the employees' personnel files.

The record reflects that some EDF foremen/assistant supervisors have signed reprimand forms constituting disciplinary action against employees, including employee suspensions, and that these forms were placed in the affected employees' personnel files. However, of the six forms submitted into evidence, one was issued by an EDF foreman over the plant manager's signature. As to the remaining forms, all but one were issued at times when the EDF foremen involved were substituting for their conceded supervisors. The exception is a reprimand issued in August 1992 by EDF foreman Gerard Collins.

An individual is a supervisor under Section 2(11) of the Act if that person exercises any of the supervisory authority set forth therein with independent judgment. The Petitioner contends that the EDF foremen/assistant supervisors are supervisors under the Act because they exercise independent judgment in assigning and directing employees in the performance of their work, investigating situations that result in disciplinary actions against employees, and reporting employee misconduct or violations of company rules, including issuing disciplinary reprimands. After a careful examination of the facts, we find that the evidence fails to show that the EDF foremen/assistant supervisors possess any of the indicia of supervisory authority set forth in Section 2(11) of the Act.

Contrary to the Petitioner's assertions, there is no record evidence establishing that these individuals as-

sign work or direct employees with the requisite discretion or independent judgment. Instead, the evidence indicates that the EDF foremen/assistant supervisors' role in assigning and directing employees' work is limited primarily to monitoring production and training line employees. Such duties are more consistent with their greater experience as EDF operators than evidence of supervisory authority. Nor is there any evidence in the record demonstrating that the EDF foremen/assistant supervisors exercise independent judgment when they shift employees around within their respective lines to get projects accomplished.

Regarding the Petitioner's contention that the EDF foremen/assistant supervisors exercise responsibility in disciplining employees, the reprimand form issued by an EDF foreman over a conceded manager's signature provides no support for the Petitioner's assertion that the EDF foreman issued the disciplinary action independently. With respect to the remaining forms which were issued by EDF foremen independently when they were acting for their conceded supervisors, these do indicate the exercise of supervisory authority under the Act. However, it is clearly established that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular and substantial. *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992), and *Canonie Transportation*, 289 NLRB 299, 300 (1988), citing *Aladdin Hotel*, 270 NLRB 838 (1984). As stated above, the record is clear that the EDF foremen/assistant supervisors substitute for their undisputed supervisors only when the supervisors are sick or on leave, which Hexacomb's acting plant manager at the hearing estimated occurred approximately 8–10 percent of the time. Therefore, even if all the EDF foremen/assistant supervisors exercise statutory supervisory authority when substituting, their assumption of supervisory duties is irregular and sporadic, e.g., during vacation periods or on other unscheduled occasions, and therefore is insufficient to establish supervisory authority. *Latas De Aluminio Reynolds*, 276 NLRB 1313 (1985); and *Canonsburg General Hospital Assn.*, 244 NLRB 899 (1979).

Finally, there is the one reprimand signed by EDF foreman Collins which issued in August 1992 at a time when there is no evidence Collins was substituting for his supervisor. As this single unexplained reprimand is an isolated occurrence, we find it insufficient to establish that EDF foremen/assistant supervisors exercise supervisory authority.

Foreman Gonzalez, whom the Petitioner also claims is a supervisor, is one of Hexacomb's three foremen who work on the line. In support of its claim, the Petitioner raises the same arguments as set forth above regarding the EDF foremen/assistant supervisors. The record, however, contains conflicting evidence with respect to Gonzalez' supervisory authority, i.e., although Gonzalez apparently issued five reprimands independently, including three for suspension, the acting plant manager testified that Gonzalez had no authority to issue reprimands. This conflict is best resolved after a full hearing with credibility resolutions. Thus, as to that individual, we will allow him to vote subject to

challenge in the event an election is ultimately held in an appropriate unit.

3. As stated above, we find the petitioned-for unit inappropriate for bargaining. The record indicates that the Petitioner's counsel was uncertain when asked at the end of the hearing whether the Petitioner wished to proceed in any unit found appropriate other than that petitioned for. Accordingly, we remand this case to the Regional Director for further appropriate action consistent with this decision.

ORDER

It is ordered that this case be remanded to the Regional Director for further appropriate action.